

NO. 42021-0-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

VERONICA WITTEN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 09-1-05488-8

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.</u>	1
1.	Whether the defendant has failed to meet her burden of showing either prosecutorial misconduct or that the unchallenged argument at issue was flagrant and ill-intentioned where the deputy prosecutor's examination of witnesses and argument concerning the defendant's statements and post-arrest silence were proper and consistent with constitutional guarantees.	1
2.	Whether, assuming <i>arguendo</i> , that either the deputy prosecutor's questions or argument were improper, any error was harmless where there was overwhelming untainted evidence supporting the decision of the jury.	1
B.	<u>STATEMENT OF THE CASE</u>	1
1.	Procedure	1
2.	Facts	5
C.	<u>ARGUMENT</u>	16
1.	THE DEFENDANT HAS FAILED TO MEET HER BURDEN OF SHOWING EITHER PROSECUTORIAL MISCONDUCT OR THAT THE UNCHALLENGED ARGUMENT AT ISSUE WAS FLAGRANT AND ILL-INTENTIONED BECAUSE THE DEPUTY PROSECUTOR'S EXAMINATION OF WITNESSES AND ARGUMENT CONCERNING THE DEFENDANT'S STATEMENTS AND POST-ARREST SILENCE WERE PROPER AND CONSISTENT WITH CONSTITUTIONAL GUARANTEES.	16

2.	ASSUMING <i>ARGUENDO</i> THAT EITHER THE DEPUTY PROSECUTOR’S QUESTIONS OR HER ARGUMENT WERE IMPROPER, ANY ERR WAS HARMLESS BECAUSE THERE WAS OVERWHELMING UNTAINTED EVIDENCE SUPPORTING THE DECISION OF THE JURY.....	35
D.	CONCLUSION.....	

Table of Authorities

State Cases

<i>State v. Anderson</i> , 153 Wn. App. 417, 427, 220 P.3d 1273 (2009)...	17, 18
<i>State v. Anderson</i> , 44 Wn. App. 644, 649, 723 P.2d 464 (1986).....	35, 36
<i>State v. Brown</i> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997).....	17, 18
<i>State v. Burke</i> , 163 Wn.2d 204, 217, 181 P.3d 1, 9 (2008)....	20, 21, 22, 24
<i>State v. Clark</i> , 143 Wn.2d 731, 765, 24 P.3d 1006 (2001)	22, 27, 34
<i>State v. Curtiss</i> , 161 Wn. App. 673, 698, 250 P.3d 496 (2011)	17
<i>State v. Easter</i> , 130 Wn.2d 228, 235, 922 P.2d 1285, 1289 (1996).....	19, 20, 21
<i>State v. Eaton</i> , 30 Wn. App. 288, 291-93, 633 P.2d 921 (1981).....	30
<i>State v. Fisher</i> , 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009).....	17, 18
<i>State v. Gregory</i> , 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)	17
<i>State v. Guloy</i> , 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).....	35, 36
<i>State v. Knapp</i> , 148 Wn. App. 414, 420, 199 P.3d 505, 508 (2009).....	19, 20
<i>State v. Larios-Lopez</i> , 156 Wn. App. 257, 260, 233 P.3d 899 (2010)	17
<i>State v. Lewis</i> , 130 Wn.2d 700, 705-06, 927 P.2d 235 (1996).....	21, 24, 29, 32, 34
<i>State v. Lucas</i> , 271 P.3d 394, 397 (2012)(2012 WL 716552)	29, 30, 31, 33
<i>State v. Lui</i> , 153 Wn. App. 304, 321, 221 P.3d 948 (2009)	29, 32
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006)	17

<i>State v. Pastrana</i> , 94 Wn. App. 463, 479, 972 P.2d 557 (1999)	18
<i>State v. Russell</i> , 125 Wn.2d 24, 87, 882 P.2d 747 (1994).....	18
<i>State v. Slone</i> , 133 Wn. App. 120, 127, 134 P.3d 1217 (2006).....	21
<i>State v. Stenson</i> , 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), <i>cert. denied</i> , 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998).....	17
<i>State v. Swan</i> , 114 Wn.2d 613, 661, 790 P.2d 610 (1990).....	17
<i>State v. Yates</i> , 161 Wn.2d 714, 774, 168 P.3d 359 (2007).....	18
<i>State v. Young</i> , 89 Wn.2d 613, 621, 574 P.2d 1171 (1978).....	22
<i>Washington Irr. And Development Co. v. Sherman</i> , 106 Wn.2d 685, 688, 724 P.2d 997 (1986).....	29

Federal and Other Jurisdictions

<i>Beck v. Washington</i> , 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).....	17
<i>Berghuis v. Thompkins</i> , 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010) (2010 WL 2160784).....	19, 20, 26, 34
<i>Brecht v. Abrahamson</i> , 507 U.S. 619, 628, 113 S. Ct. 1710, 1716-17, 123 L. Ed. 2d 353 (1993).....	20
<i>Doyle v. Ohio</i> , 426 U.S. 610, 617, 96 S. Ct. 2240, 2244-45, 49 L. Ed. 2d 91 (1976).....	20
<i>Jenkins v. Anderson</i> , 447 U.S. 231, 236, n.2, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).....	21
<i>Malloy v. Hogan</i> , 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) ..	19
<i>Matire v. Wainwright</i> , 811 F.2d 1430 (11 th Cir. 1987).....	34

<i>Purtuondo v. Agard</i> , 529 U.S. 61, 69-70, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000)	21
<i>Quinn v. United States</i> , 349 U.S. 155, 164, 75 S. Ct. 668, 99 L. Ed. 964 (1955)	19
<i>State v. Osborne</i> , 50 Ohio St.2d 211, 216, 364 N.E.2d 216 (1977), <i>vacated on other grounds by</i> 438 U.S. 911, 98 S. Ct. 3137, 57 L. Ed. 2d 1157 (1978)	22
<i>Wainwright v. Greenfield</i> , 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986)	34

Constitutional Provisions

Article I, section 9, Washington State Constitution.....	19, 22, 24
Fifth Amendment, United States Constitution.....	18, 19, 20, 21, 22, 24
Fourteenth Amendment, United States Constitution	18, 20, 22, 24

Rules and Regulations

CrR 3.5	2
ER 703	29, 31
ER 705	29, 31
ER 801(c)	30

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant has failed to meet her burden of showing either prosecutorial misconduct or that the unchallenged argument at issue was flagrant and ill-intentioned where the deputy prosecutor's examination of witnesses and argument concerning the defendant's statements and post-arrest silence were proper and consistent with constitutional guarantees.

2. Whether, assuming *arguendo*, that either the deputy prosecutor's questions or argument were improper, any err was harmless where there was overwhelming untainted evidence supporting the decision of the jury.

B. STATEMENT OF THE CASE.

1. Procedure

On December 7, 2009, Veronica Witten, hereinafter referred to as the "defendant," was charged by information with attempted first-degree premeditated murder in count I and first-degree burglary in count II. CP 1-3. Both counts included a firearm sentence enhancement. CP 1-3.

On February 14, 2011, the State filed an amended information, which added count III, charging violation of a restraining order. CP 48-

49; RP 8. The defendant was arraigned on that information the same day.
RP 8-9.

On February 22, 2011, the case was called for trial. RP 14.

The court heard motions in limine on February 24, 2011. RP 17-25, 313-19. *See* RP 39-42, 571-76. The parties indicated that the defendant made statements to the arresting deputy, and proposed that, should the defendant not stipulate to their admissibility, they conduct a hearing pursuant to CrR 3.5 prior to that deputy's testimony. RP 22-24; 42-43. On March 3, 2011, the defendant stipulated that "there is no contested issue regarding statements made by the defendant, Veronica Witten, to Deputy Brian Heimann on December 4, 2009," and agreed "that these statements were not made as a result or during custodial interrogation and as such, no CrR 3.5 motion need be held." CP 97. RP 509-10.

The State moved to admit orders in the dissolution of marriage of Defendant and Michael Witten, including an *ex parte* restraining order. RP 220-21. The defense had no objection and those orders were admitted. RP 221.

The parties conducted *voir dire* on February 28 and March 1, 2011, RP 44-217, 221-302, and selected a jury on March 1, 2011. RP 302-07. The court read the preliminary instructions to the jury, RP 307-12.

The parties gave their opening statements. RP 320-21.

The State then called Michael Witten, RP 321-52, 357-429, Anna Meuangkhot, RP 429-58, Robin Scott, RP 459-64, Maurice Johnson, RP 464-78, Kris Kindschuh, RP 478-95, Dr. David Misner, RP 495-505, Beatrice Enser, RP 511-26, Deputy Jessica Johnson, RP 526-49, Deputy Adam Pawlak, RP 549-56, Deputy Inga Carpenter, formerly known as Inga Carey, RP 556-70, Deputy Brian Heimann, RP 578-608, Deputy Brent Van Dyke, RP 608-26, Deputy Arthur Centoni, RP 626-35, Deputy Anthony Messineo, RP 635-44, Joshua Meyer, RP 660-67, Detective Kevin Johnson, RP 667-79, Forensics Investigator Clarence Mason, RP 679-99, 716-18, Johan Schoeman, RP 699-715, and Detective Sergeant James Loeffelholz, RP 723-70.

The State rested on March 8, 2011. RP 770.

The trial court considered the State's motion to exclude the testimony of April Gerlock, and ultimately denied that motion. RP 772-84.

The defendant called Dr. April Gerlock, RP 856-1040, and rested. RP 1044.

The parties agreed to jury instructions, RP 771-72, 791-843, and the court read those instructions to the jury. RP 1045.

The parties gave their closing arguments. RP 1049-79 (State's closing argument); RP 1080-95 (Defendant's closing argument); RP 1095-1103 (State's rebuttal argument).

On March 16, 2011, the jury returned verdicts of guilty to attempted first degree murder as charged in count I, guilty to first degree burglary as charged in count II, and guilty to violation of a restraining order as charged in count III. CP 276, 280, 284; RP 1108-13. *See* CP 277, 287. The jury also returned special verdicts indicating that the defendant and victim Michael Witten were members of the same family or household for purposes of counts I, II, and III, CP 278, 282, 285, and that the defendant was armed with a firearm at the crime of the commission of counts I and II. CP 279, 283; RP 1109-13.

On March 25, 2011, the court sentenced the defendant to 347 months on count I plus 34 consecutive months on count II plus 60 consecutive months for each firearm sentence enhancement, for a total of 501 months in total confinement. CP 295-307; RP 1146-49. This total was reduced by an order correcting judgment and sentence filed March 28, 2011, in which the court corrected its sentence to read 346 months of standard-range confinement plus 120 months of enhancement confinement for a total of 467 months of total confinement. CP 308-10. Moreover, the court deleted its original order that the confinement on each count was to run consecutively. CP 308-10. The court also sentenced the defendant to 36 months of community custody on count I and 18 months of community custody on count II, as well as to payment of legal financial obligations totaling \$800.00. CP 295-307. *See* RP 1147-49.

The defendant filed a timely notice of appeal on April 22, 2011.
CP 315.

2. Facts

Michael Witten served 19 years in the United States Army, during which he met and married the defendant. RP 322-27, 380. Witten¹ was deployed to Iraq in April, 2008. RP 329. When he returned on leave, the couple began divorce proceedings. RP 330.

Witten moved into apartment number K-101 at the Nantucket Gate Apartments in Tacoma, Washington on August 14, 2009. RP 332-33, 432. Anna Meuangkhot, with whom he was starting a romantic relationship, stayed in that apartment with him occasionally. RP 331-33, 403. Entrance to the apartment complex was controlled by a gate, which required a code to raise. RP 335-36.

On December 4, 2009, Witten drove home and found Anna in the apartment, cooking dinner. RP 338. She was sitting on a bar stool at the time, because she had suffered a broken ankle. RP 338-40. Witten greeted her, grabbed a beer and a cigarette, and went to the back patio to smoke the cigarette, closing the sliding glass door behind him. RP 338-41.

¹ For clarity, because they share the same surname, Ms. Veronica Witten is referred to herein as "defendant," and Mr. Michael Witten as "Witten." No disrespect is intended to either party.

He was there for less than a minute when the defendant approached from the left. RP 341-43. Witten testified that there was “a dilapidated board fence that separates the property” to the left of his patio and a wooded area beyond that. RP 342. He did not recognize the defendant because the light from his patio was shining in his eyes and she was wearing “very dark clothes and a hoodie.” RP 343.

The defendant said, “I bet you didn’t expect to see me ever again,” and he told her that she was not supposed to be there. RP 343. The defendant replied, “I know.” RP 343.

Witten extinguished his cigarette, re-entered the apartment, and began closing the sliding glass door behind him, when he noticed the defendant’s face “right there... on the sliding glass window.” RP 343; RP 410-11. As he tried to lock the door, he observed that the defendant was holding a handgun. RP 343-44, 411. Witten described the firearm as a black pistol. RP 345.

He then saw a “muzzle blast” from the pistol and felt an impact. RP 345. He testified that the bullet entered the area of the left side of his rib cage, “blasted [a] kidney out,” and lodged in some muscle a couple inches from his spine. RP 345-46, 371.

Witten heard the glass door break and fell backward onto the living room floor. RP 346. The defendant then reached her hand through the door and Anna screamed. RP 346. Witten watched as the defendant

trained the pistol on Anna, who ran out the front door. RP 346-47; RP 411.

The defendant came through the broken glass door and pointed the gun at Witten. RP 347. She was trying to work the pistol's slide when Witten got up and ran into the bedroom. RP 347-48. He grabbed his shotgun, and returned to the living room, where the defendant was continuing to work the slide of her pistol. RP 348-49. He threw the shotgun down and grabbed around her, to try to gain control of the pistol. RP 350. He was able to get the weapon into his hand and the defendant said, "let me go." RP 352-52. Apparently, Witten actually took the pistol from the defendant. *See* RP 361. Witten testified that he "kind of eased up," and she flung him off of her. RP 352. He fell to the floor and she walked off nonchalantly to a "grayish" vehicle. RP 352. He testified that the vehicle was not one which the defendant owned. RP 352. *See* RP 378. She got into that vehicle and drove away without speeding. RP 352.

After she left, Witten got into the door of his apartment, dropped the pistol, found his cell phone, and called the number of the last person who had called him that day, that of his commander, Captain Robin Scott. RP 358-61. He managed to tell Scott that the defendant had come to his residence and shot him, before another man came to his assistance and he passed the telephone to him. RP 358-59. That man located the bullet wound and placed his own shirt over the wound. RP 360.

Witten testified that the defendant was never invited into the residence. RP 361. He indicated that the last time he had seen her was at a court hearing on September 30, 2009. RP 368, 370. He identified a temporary restraining order, which had been previously admitted into evidence that restrained Witten and the defendant from having contact with one another. RP 368-70.

Witten testified that he was transported to an emergency room, and underwent surgery the same day, during which his kidney was removed. RP 371. He testified that he had two bullet fragments remaining in his body and a pin in his spine. RP 372. He lost one hundred pounds during his recovery and rated his subsequent daily pain at about eight on a scale of one to ten. RP 373.

Anna Meuangkhot testified that she met Michael Witten in 2009, and thereafter entered into a dating relationship with him. RP 431-32. She testified that she was at Witten's apartment on December 4, 2009, at about 4:45 p.m. to 5:00 p.m. making dinner. RP 433-34. She indicated that she had her leg up on a stool because she had a fractured left ankle and was awaiting surgery. RP 433, 436. Witten came home, greeted her, grabbed a cigarette, and went outside. RP 435.

Less than a minute later, she heard a loud scream from Witten, and that, when she looked over her shoulder, saw glass shattering and "smoke coming down." RP 435, 449. Meuangkhot then saw the defendant enter the apartment through the shattered glass door and point a gun at her. RP

435-37, 449. Meuangkhot ran outside the apartment, screaming for help. RP 437-38, 450. She eventually encountered one man who called 911 and another named Maurice, who ran back to her apartment to assist. RP 439-41. As they neared the apartment, they saw the defendant leaving in a car, and hid behind another car. RP 440-41. The defendant drove away slowly. RP 441. Maurice then went over to Witten, removed his own shirt, and applied it to the gunshot wound. RP 442. Meuangkhot described Witten as “faint and pale,” and “ready to go away.” RP 443.

Maurice Johnson testified that he lived in the N building of the Nantucket Gate Apartments and that, on December 4, 2009 at about 5:00 p.m., he heard a gunshot and a young lady yelling, “Somebody help. Call 9-1-1.” RP 464-66. Johnson came downstairs, met the woman, and tried to call 911, but was disconnected. RP 467. The woman then told him, “We’ve got to go help him,” referring to the man who had been shot. RP 467. Johnson then went to Witten’s apartment, where he saw a man and woman “kind of wrestling round a little bit.” RP 468-69. He then backed out to avoid being shot himself, and again tried to call 911. RP 469-70.

Johnson then saw a vehicle being driven “nonchalantly” away by a woman, and “[t]he young lady who said, ‘Call 9-1-1’ said, ‘[t]hat’s her.’” RP 470, 473. He and this young lady ducked behind a car until the woman passed, and then he went into the apartment to try to assist Witten. RP 471-74. Johnson was then able to contact 911. RP 474.

U.S. Army Captain Robin Scott was a company commander at Joint Base Lewis McChord and Witten's company commander for about a year. RP 459-60. On December 4, 2009, she received a telephone call from Witten in which he told her, "Ma'am she shot me. Veronica shot me." RP 461. Scott knew "Veronica" as Veronica Witten. RP 461-62.

Pierce County Sheriff's Deputy Inga Carpenter was dispatched to the shooting at 5:21 p.m. of December 4, 2009. RP 557-61. She arrived at the apartment at 5:25 p.m., and found Michael Witten lying on the floor of the apartment between the kitchen and the living room. RP 557-62. Witten had suffered a gunshot wound and somebody was applying pressure to the man's abdomen. RP 559-60. Witten told Carpenter that his estranged wife, the defendant, had shot him. RP 563. *See* RP 567-68. Carpenter also obtained a written statement from Maurice Johnson. RP 564-65.

On December 4, 2009, at 5:21 p.m., Pierce County Sheriff's Deputy Jessica Johnson was dispatched to a report of a shooting at 11608 10th Avenue Court East, apartment K-101. RP 529-31. She arrived at the scene about three minutes later, at 5:24 p.m., assisted Deputy Carpenter, then Carey, in clearing the apartment, and spoke with Meuangkhot. RP 531-34. *See* RP 557-58.

Meuangkhot was crying and told the deputy that her boyfriend, Michael, was outside smoking a cigarette when she heard him screaming, "Oh, my God, oh, my God, somebody help me." RP 534-36.

Meuangkhot then saw Michael's "ex-wife" point a gun at her, before Meuangkhot ran out of the apartment. RP 536-37.

Pierce County Sheriff's Deputy Anthony Messineo interviewed Maurice Johnson and had him complete a written statement. RP 641-43.

Pierce County Sheriff's Deputy Adam Pawlak was also dispatched to the shooting at 5:21 p.m. and arrived at 5:28 p.m. on December 4, 2009. RP 551-52. He maintained the major incident log at the scene, keeping track of who came in and who left the scene. RP 553.

Pierce County Sheriff's Deputy Brent Van Dyke also responded to the apartment and participated in the clearing of that apartment. RP 610-13. Van Dyke noticed a Ruger model P-95 semiautomatic pistol on the floor of that apartment and moved it to his vehicle. RP 613-16. Van Dyke testified that the magazine of the pistol did not appear to be "fully seated" and that "[t]here was a gap between the firearm and the floor plate in the magazine." RP 618. Detective Sergeant Loeffelholz, a firearms instructor, testified that a common cause of malfunction in a semiautomatic pistol is not having the magazine seated properly. RP 759-65.

Pierce County Sheriff's Department Detective Kevin Johnson responded to Madigan Army Medical Center to check the status of Witten. RP 670-73. He was told that Witten was in surgery, and that they had removed a metal fragment, which Johnson recovered, along with the

clothing that Witten had been wearing. RP 673-75. Johnson turned these items over to forensics investigator Skip Mason. RP 675.

Forensics Investigator Mason photographed the pistol collected by Deputy Van Dyke. RP 682. It was a black Ruger P-95, semiautomatic .40 caliber pistol. RP 683. Mason cleared the weapon, by removing the seven rounds in its magazine and the spent casing in its barrel, to make it safe. RP 682-83. The pistol was collected and ultimately admitted into evidence at trial. RP 684-90. Mason also collected the spent projectile and clothing, which Detective Johnson had recovered from Madigan Army Medical Center. RP 692-95. Finally, Mason assisted in searching the defendant's vehicle, RP 695, by taking photographs of the vehicle itself and any items of evidence found therein. RP 718.

Washington State Patrol Forensic Scientist Johan Schoeman performed an examination on the Ruger pistol, the seven unfired cartridges, the fired bullet, and the cartridge case. RP 703-05. Schoeman determined that the pistol was fully operable, RP 705-08, and that the fired bullet and cartridge case had been fired from that pistol. RP 708.

Detective Sergeant James Loeffelholz responded to the apartment, which he indicated was located in Pierce County, Washington. RP 727-30. Loeffelholz determined that the defendant lived on Fort Lewis and contacted Deputy Brian Heimann to drive to that location. RP 731-32.

Pierce County Sheriff's Deputy Brian Heimann testified that he was working on December 4, 2009, and that he was dispatched to the

defendant's Fort Lewis address, but found that residence was mostly dark and that no vehicles were present. RP 578-83. As he was parked on the street outside, speaking with a Fort Lewis investigator, he saw the defendant's red Toyota drive by. RP 583-84. As it drove past, it began to accelerate. RP 584-85. Heimann got into his patrol car, activated its emergency overhead lights and siren and pursued her vehicle. RP 584-85. The defendant made a left turn, and ultimately stopped in the middle of an intersection. RP 586.

Deputy Heimann took the defendant into custody, placing her in handcuffs, and read her the *Miranda* warnings. RP 587-88, 604. He transported her to the Pierce County Sheriff's Department to meet with detectives. RP 590-91.

Detective Sergeant Loeffelholz advised Detective Stepp of the arrest, and the two met at the Sheriff's Department, RP 736, where Loeffelholz advised the defendant that she was under arrest. RP 738. Loeffelholz subsequently searched the defendant's vehicle and found a receipt for a rental car in that vehicle. RP 743. He also found a black "baseball-type cap," a pair of rubber gloves, a pair of black shoes in that vehicle, a plastic container used to hold ammunition, and a single 9-millimeter cartridge in the defendant's vehicle. RP 744-46. A receipt for handgun purchase at Bullseye Shooter Supply was also later found in the defendant's vehicle by Michael Witten. RP 751-52.

Deputy Heimann indicated that the defendant did not show any emotion until the detectives left the room, and she began to cry and shake. RP 594. The defendant then asked Heimann to check on Michael and to check on her dogs. RP 594.

After the defendant spoke with the detectives, Heimann booked her into the Pierce County jail. RP 596. During a pat-down search during the booking process, corrections officers found glass shards that fell out of the defendant's coat. RP 597. Those shards were collected and ultimately admitted into evidence at trial. RP 597-98. The defendant asked Heimann if she could talk to a mental health professional during the booking process. RP 601-02, 607.

Dr. David Misner testified that he was an emergency room staff physician at Madigan Army Medical Center, and that he was working on December 4, 2009, when Witten came into the emergency room with a gunshot wound to his left side. RP 498-99. Witten had to be resuscitated, and a bullet was seen inside of him on an X-ray. RP 500-01. He was taken to the operating room for an exploratory laparotomy, and ultimately a nephrectomy. RP 500, 503-04. Specifically, surgeons found that Witten's left kidney was "shattered," removed it, and repaired the other areas damaged by the bullet. RP 503-04.

Kris Kindschuh testified that he was the manager of Bull's Eye Shooter Supply, a store that sells firearms and sporting goods. RP 479. Kindschuh testified that Veronica Witten purchased a Ruger P-95 9-mm

semi-automatic pistol from his store on November 24, 2009, and picked that pistol up on December 1, 2009. RP 490-92. Veronica Witten also purchased two boxes of ammunition for that pistol. RP 492-93. One of those boxes contained what Kindschuh described as “self-defense ammo,” jacketed, hollow-point rounds, “designed to create great bodily harm without over penetration and exiting the intended target.” RP 493.

Beatrice Enser, a risk manager at Enterprise Alamo National, RP 511-12, testified that Veronica Witten rented a silver 2010 Hyundai Accent from her company’s store located in Tacoma, Washington, on December 1, 2009, which was returned on December 4, 2009 at 5:36 p.m. RP 519-20. The car was brought back with the same level of fuel that it had when rented. RP 522.

Dr. April Gerlock, a “psychiatric nurse practitioner” who holds a Ph.D. in nursing, RP 857-58, testified that she interviewed the defendant one time, seven months after the shooting, for approximately two to two and a half hours, but did not perform any psychiatric or psychological testing of the defendant. RP 871, 942, 962. She testified that another professional had administered the defendant one test, which indicated that the defendant’s mental status was normal. RP 872-73. Gerlock also reviewed a memorandum prepared by defense counsel, which summarized the defendant’s medical records. RP 875-76, 939-40. Gerlock formed the opinion that, on the afternoon of December 4, 2009, the defendant suffered from “a major depressive disorder,” posttraumatic stress disorder, a

“dissociative disorder, not otherwise specified,” and “disorders of extreme stress, not otherwise specified.” RP 905-07. *See* RP 907-19. Ultimately, Gerlock opined that the defendant was not capable of forming the intent to commit a crime because of a dissociative episode. RP 923-24. Gerlock testified that the facts that the defendant had hired a private investigator to find out where Witten lived and that the defendant took a gun to Witten’s residence did not change her opinion. RP 924-25. Gerlock did not use any test to determine if the defendant was malingering, RP 930-32, though she did testify that the defendant’s anger at the end of her marriage and her spouse “moving on with someone else” were a “part” of what happened. RP 945.

C. ARGUMENT.

1. THE DEFENDANT HAS FAILED TO MEET HER BURDEN OF SHOWING EITHER PROSECUTORIAL MISCONDUCT OR THAT THE UNCHALLENGED ARGUMENT AT ISSUE WAS FLAGRANT AND ILL-INTENTIONED BECAUSE THE DEPUTY PROSECUTOR’S EXAMINATION OF WITNESSES AND ARGUMENT CONCERNING THE DEFENDANT’S STATMENTS AND POST-ARREST SILENCE WERE PROPER AND CONSISTENT WITH CONSTITUTIONAL GUARANTEES.

“Without a proper timely objection at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative jury

instruction could have corrected the possible prejudice.” *State v. Curtiss*, 161 Wn. App. 673, 698, 250 P.3d 496 (2011); *State v. Larios-Lopez*, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998))). This is because the absence of an objection “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Even where there was a proper objection, an appellant claiming prosecutorial misconduct “bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009); *State v. Fisher*, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); *State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)); *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962) (before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.”). Hence, a reviewing court must first evaluate whether the prosecutor’s comments were improper. *Anderson*, 153 Wn. App. at 427.

“The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Anderson*, 153 Wn. App. 417, 427-28, 220 P.3d 1273 (2009). “It is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory,” and “the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

“A prosecutor’s improper comments are prejudicial ‘only where ‘there is a substantial likelihood the misconduct affected the jury’s verdict.’” *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (quoting *Brown*, 132 Wn.2d at 561, 940 P.2d 546); *Fisher*, 165 Wn.2d at 747. “A reviewing court does not assess ‘[t]he prejudicial effect of a prosecutor’s improper comments... by looking at the comments in isolation but by placing the remarks ‘in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’” *Id.* (quoting *Brown*, 132 Wn.2d at 561). “[R]emarks must be read in context.” *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999).

“The Fifth Amendment to the United States Constitution states, in part, no person ‘shall... be compelled in any criminal case to be a witness against himself’ and applies to the states through the Fourteenth Amendment. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285, 1289

(1996) (*citing Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

Similarly, Article I, section 9 of the Washington State Constitution guarantees that “[n]o person shall be compelled in any criminal case to give evidence against himself.”

Thus, “[b]oth the United States and Washington Constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence.” *State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505, 508 (2009) (*citing* U.S. Const. amend. V; Wn. Const. art. I, sec. 9). The Washington State Supreme Court has stated that it “interpret[s] the two provisions equivalently.” *Easter*, 130 Wn.2d at 235.

A suspect who wants to invoke his or her right to remain silent must do so unambiguously, such as by saying that he or she wants to remain silent or does not want to talk with the police. *Berghuis v. Thompson*, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010) (2010 WL 2160784). *But see Quinn v. United States*, 349 U.S. 155, 164, 75 S. Ct. 668, 99 L. Ed. 964 (1955) (Fifth Amendment right to silence is asserted by conduct “sufficiently definite to apprise” the listener that the claim is being made), *Easter*, 130 Wn.2d at 239, 922 P.2d 1285 (noting that “[n]o special set of words is necessary to invoke the right,” and that “silence in the face of police questioning is quite expressive as to the person’s intent to invoke the right.”). Moreover, “[i]f the State establishes that a *Miranda* warning was given and that it was understood by the accused, an

accused's uncoerced statement establishes an implied waiver."

Thompkins, 130 S. Ct. at 2254.

The U.S. and Washington State Supreme Courts, however, have distinguished between "prearrest silence," which is "based upon the Fifth Amendment right to remain silent before *Miranda* warnings are given" and "postarrest silence," which is "based upon due process under the Fourteenth Amendment when the State issues *Miranda* warnings." *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1, 9 (2008).

"Courts have generally treated comments on post-arrest silence as a violation of a defendant's right to due process because the warnings under *Miranda* constitute an 'implicit assurance' to the defendant that silence in the face of the State's accusations carries no penalty" such that the subsequent use of post-arrest silence "after the *Miranda* warnings is fundamentally unfair and violates due process." *Easter*, 130 Wn.2d 228 at 236 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 628, 113 S. Ct. 1710, 1716-17, 123 L. Ed. 2d 353 (1993); *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S. Ct. 2240, 2244-45, 49 L. Ed. 2d 91 (1976)). "Due process under the Fourteenth Amendment prohibits impeachment based on a defendant's silence after he receives *Miranda* warnings, even if the defendant testifies at trial." *Knapp*, 148 Wn. App. at 420.

The Fifth Amendment however, prohibits impeachment based upon the exercise of prearrest silence only "where the accused does not waive the right and does not testify at trial." *Burke*, 163 Wn.2d at 217.

But see Purtuondo v. Agard, 529 U.S. 61, 69-70, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) (citing *Jenkins v. Anderson*, 447 U.S. 231, 236, n.2, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980)), which noted that it was not clear whether the Fifth Amendment even protects “prearrest silence”). Because prearrest silence “lacks such ‘implicit assurance’ from the State about its punitive effect in future proceedings,” it does not implicate due process principles. *Easter*, 130 Wn.2d at 236-37. Therefore, “no constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State’s issuance of *Miranda* warnings.” *Burke*, 163 Wn.2d at 217.

The Washington State Supreme Court has determined that “even when the defendant testifies at trial, use of prearrest silence is limited to impeachment and may not be used as substantive evidence of guilt.” *Id.* (citing *State v. Lewis*, 130 Wn.2d 700, 705-06, 927 P.2d 235 (1996)). The Court noted that “[i]mpeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful.” *Id.* at 219.

“In circumstances where silence is protected, a mere reference to the defendant’s silence by the government is not necessarily a violation of this principle.” *Id.* at 217; *State v. Slone*, 133 Wn. App. 120, 127, 134 P.3d 1217 (2006). “A comment on an accused’s silence occurs when used to the State’s advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). “A remark that does

not amount to a comment is considered a ‘mere reference’ to silence and is not reversible error absent a showing of prejudice.” *Burke*, 163 Wn.2d at 216. Thus, it is only “when the State invites the jury to infer guilt from the invocation of the right of silence, the Fifth Amendment and article I, section 9 of the Washington Constitution are violated.” *Id.* at 217.

Moreover, “[w]hen a defendant does not remain silent and instead talks to police, the state may comment on what he [or she] does not say.” *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001) (citing *State v. Young*, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978) (citing *State v. Osborne*, 50 Ohio St.2d 211, 216, 364 N.E.2d 216 (1977), vacated on other grounds by 438 U.S. 911, 98 S. Ct. 3137, 57 L. Ed. 2d 1157 (1978))).

In the present case, although the defendant argues that the deputy prosecutor committed misconduct by eliciting several pieces of testimony and making certain arguments regarding the defendant’s post-arrest silence, the record shows otherwise.

First, the defendant cites the following portion of the deputy prosecutor’s direct examination of Deputy Heimann as violating her Fifth Amendment, Fourteenth Amendment, and Article I, § 9 rights:

- Q Okay. During your transport of [the defendant] from Fort Lewis to the County-City Building, can you describe for the jury any things that you were able to observe of her demeanor?
- A Really, no emotions, *didn’t really speak at all.*

Q *Do you recall the – did she ask you any questions at that time?*

A *No.*

Q *When you placed [the defendant] under arrest, did you – did she ask you any questions at that time?*

A *No.*

....

Q Okay. Do you know how long it was after you had gotten to the parking lot until the time that it took Detective Loffelholz to meet up with you all?

A A maximum of five to seven minutes.

....

Q *Okay. And during that time period, did she ask you any questions?*

A *No, I didn't [sic]*

Q *No –*

A *No, she did not.*

Q Okay. Did you ask her any questions?

A No.

RP 591-93 (emphasis added). *See* Brief of Appellant, p. 13-14.

The defendant did not object to any of these questions or answers she now claims were constitutionally offensive. *See* RP 591-94.

While the deputy prosecutor's questions did elicit testimony concerning the defendant's silence, that testimony was only that the defendant asked no questions between the time of arrest and the time of arrival of detectives at the station. *See* RP 591-93. Deputy Heimann made no other comment on the defendant's silence and the deputy prosecutor never suggested to the jury that such silence was an admission of guilt. *See* RP 578-608.

Thus, this testimony was not “used to the State’s advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). As a result, it is not “[a] comment on an accused’s silence.” *Lewis*, 130 Wn.2d at 707. Indeed, because the prosecutor here did not “invite[] the jury to infer guilt from the invocation of the right of silence,” neither the Fifth Amendment, Fourteenth Amendment, nor article I, section 9 provisions were violated, *see Burke*, 163 Wn.2d at 217, and the defendant has failed to show that the deputy prosecutor committed misconduct in this regard.

Second, the defendant argues that the following exchange was improper:

- Q Okay. And during the conversations that were had with the detectives and during the times that you were alone with [the defendant] while she was in the interview room, can you describe for the jury what her demeanor was?
- A Well, I don’t think she was with the detectives. She did not cry, didn’t really show any emotion. When the detectives left the room, she cried. She was shaking. She asked me to check on Michael, and asked me to check on her dogs.

RP 594. *See* RP 595-96. *See* Brief of Appellant, p. 14-15.

However, the witness’s description of the defendant either crying or not crying is not a comment on the defendant’s silence, but a

description of her demeanor. Therefore, it cannot be an improper comment on the defendant's silence. Moreover, the deputy prosecutor's question did not ask for such a comment, but simply asked the witness to "describe for the jury what [the defendant's] demeanor was." RP 594. While the witness went on to volunteer that the defendant asked him to check on Michael and her dogs, these were spontaneous statements made to the witness after the defendant had been read the *Miranda* warnings, and not silence. Moreover, they were statements that the defendant stipulated were admissible at trial. CP 97. See RP 509-10. Therefore, the defendant has failed to show that the deputy prosecutor committed misconduct in this regard or that the witness, through his testimony, otherwise violated the defendant's rights to silence.

Third, the defendant argues that the deputy prosecutor committed misconduct in the following portion of her direct examination of Detective Sergeant Loeffelholz:

- Q Okay. Now, you had --did you have an opportunity to speak with [the defendant] in the interview room?
- A Briefly.
- Q Okay. And did you, at any point in time, advise her about Michael Witten's condition?
- A I don't recall that I did.
- Q And do you recall --well, strike that. Once you had your opportunity to speak with [the defendant], what did you -- what was your next step?
-

- Q All right. So what was the next step after you spoke with Officer Mason?
- A Then I went back and advised [the defendant] that she was under arrest.
- Q Did you advise her what it was that she was under arrest for?
- A I did.
- Q And did she ask you any questions about the charges that you –that you indicated to her?
- A I don't recall.
- Q If she had said something, is that something that you would have indicated in your report?
- A If it was significant. I would have.

RP 736-38. *See* Brief of Appellant, p. 15-16. The defendant did not object to any of this exchange at trial. *See* RP 736-39.

The first two questions and answers of this exchange pertain to a conversation between the detective and the defendant, and therefore, cannot be a comment on the defendant's silence. *See* RP 736-37.

Moreover, the testimony established that the defendant was properly read the *Miranda* warnings before this conversation, “acknowledged that she knew she did not have to speak” with officers, RP 587-88, 604, and nevertheless made some uncoerced statements to both Deputy Heimann and Detective Loeffelholz. RP 594, 736-38. Because, where “the State establishes that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver,” *Thompkins*, 130 S. Ct. at 2254, the defendant impliedly waived her rights to remain silent when she made her

statements to Heimann and Loeffelholz. Therefore, any of these statements was properly admitted, and the deputy prosecutor would not have committed misconduct in asking about them.

Moreover, because “[w]hen a defendant does not remain silent and instead talks to police, the state may comment on what he [or she] does not say,” *Clark*, 143 Wn.2d at 765, the deputy prosecutor’s inquiry as to whether the defendant asked any questions of the detective and the detective’s responses of “I don’t recall” and “If it was significant, I would have,” RP 738, were proper. Therefore, the defendant has failed to show that the deputy prosecutor committed misconduct in this regard.

Fourth, the defendant argues that the deputy prosecutor elicited improper testimony in her cross-examination of defense expert April Gerlock, Ph.D.:

- Q Okay. Now, at some point, *as you know based off the police report*, she was ultimately stopped?
- A Yes.
- Q Okay. *And based off of the reports*, she followed the commands of the officer?
- A Correct.
- Q Okay. And do as he’s instructing her, she’s doing what it is that the officer tells her to do?
- A Yes.
- Q So that means to do –to follow a command means you have to be able to process at least the words that are coming in and then actually comply with whatever is being requested of you?
- A Yes.

- Q Okay. And then she was – she was, then arrested at her car?
- A Correct.
- Q And then her contact with the police –*at no point in time in the records, or based off you're your conversation with [the defendant], did she tell you that she asked the officers who they were?*
- A *No. I don't believe so, no.*
- Q Okay. *And at no point in time did she share with you or include in the police reports* that would indicate that she asked why they were contacting her?
- A She thought they were pulling her over for harassment.
- Q Okay. But she didn't express that. She didn't ask them if they were pulling her over for harassment, did she?
- A No, not at the time, no.
- Q Okay. And so you've indicated that she says that she thought that they were pulling her over for harassment?
- A Yes.
-
- Q Okay. And you've indicated that she told you that she didn't come out of this kind of feeling of walking on clouds or this plugging of the ears or whatnot until several days after it is that she was in the Pierce County Jail?
- A She wasn't fully out of it. She said that she started to come out of it when she was pulled over, when she was stopped by the police; so she was starting to come out of it, but she wasn't fully out of it for a couple days.

RP 982-83. See Brief of Appellant, p. 16-17.

However, to the extent the deputy prosecutor inquired of statements made or not made by the defendant to the police or defense expert, she did so to explain the bases of the expert's diminished capacity

opinion, and to highlight that this opinion was largely based on subjective symptoms and narrative statements given by the defendant. Such inquiry is proper cross-examination under ER 705, and because it was not used “as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt,” *Lewis*, 130 Wn.2d at 707, it was not an improper comment on the defendant’s silence.

“ER 703 allows expert witnesses to base their opinions on facts otherwise inadmissible as long as the facts are ‘of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject,’” and “ER 705 provides, ‘[t]he expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data.’” *State v. Lucas*, 271 P.3d 394, 397 (2012)(2012 WL 716552) (quoting ER 703 & 705). *Washington Irr. And Development Co. v. Sherman*, 106 Wn.2d 685, 688, 724 P.2d 997 (1986).

However, ER 705 also provides that “[t]he expert may in any event be required to disclose the underlying facts or data on cross-examination.” ER 705. Thus, “ER 705 gives the trial court discretion to permit an expert to relate hearsay or otherwise inadmissible evidence to the jury for the limited purpose of explaining the reasons for his or her opinion.” *State v. Lui*, 153 Wn. App. 304, 321, 221 P.3d 948 (2009). “In other words, out-

of-court statements on which experts base their opinions are not hearsay under ER 801(c) because they are not offered as substantive proof, i.e., ‘the truth of the matter asserted,’” and offered “only for the limited purpose of explaining the expert’s opinion.” *State v. Lucas*, 271 P.3d 394, 398 (2012)(2012 WL 716552).

Indeed, this Court has observed that “the proper way to test the reliability of the [expert’s] opinion [i]s through cross-examination of the [expert].” *Lucas*, 271 P.3d at 398 (citing *State v. Eaton*, 30 Wn. App. 288, 291-93, 633 P.2d 921 (1981)). Specifically, the Court noted that:

the probative value of expert medical testimony may be lessened when it is based on subjective symptoms and narrative statements given by a defendant after he has been charged with a crime. The assumption underlying ER 703, however, is that opposing counsel will forcefully bring that point to the jury’s attention during cross-examination of the expert. Jurors are quite aware that a criminal defendant may be motivated to fabricate a defense and are unlikely to be influenced unduly by an expert opinion that is shown to rest on questionable sources of information. Moreover, experienced forensic psychiatrists are equally aware of the danger of fabrication and are trained to detect untruthful answers to their questions.

Lucas, 271 P.3d at 398 (quoting *State v. Eaton*, 30 Wn. App. 288, 294-95, 633 P.2d 921 (1981)) (emphasis added).

In the present case, the defense expert, Dr. April Gerlock, who is a psychiatric nurse practitioner and holds a Ph.D. in nursing, RP 857-58, testified on direct that the defendant was not capable of forming the intent

to commit a crime because of a dissociative episode. RP 923-24.

However, Gerlock testified that she performed no psychiatric or psychological testing of the defendant, RP 871, 942, 962, performed no test to determine if the defendant was malingering, RP 930-32, and instead relied on discovery in the criminal case, including the police reports, RP 868-69, a memorandum prepared by defense counsel, which summarized the defendant's medical records, RP 875-76, 939-40, and a single interview with the defendant conducted after she had been charged in this case. RP 869, 871, 942, 962.

Hence, the defendant's statements to police contained in the police reports and defendant's statements to Gerlock, were a large part of "the underlying facts [and] data," ER 705, upon which Gerlock relied in forming her opinion that the defendant's capacity to form intent was diminished. Thus, under ER 705, it was proper for the prosecutor here to explore "the probative value of expert medical testimony" because it was based largely "on subjective symptoms and narrative statements given by a defendant after he has been charged with a crime." *Lucas*, 271 P.3d at 398. Indeed, as this Court noted, "[t]he assumption underlying ER 703... is that opposing counsel will forcefully bring that point to the jury's attention during cross-examination of the expert." *Id.*

Moreover, because the testimony in question was offered “for the limited purpose of explaining the reasons for [the expert’s] opinion,” *Lui*, 153 Wn. App. 304, 321, 221 P.3d 948 (2009), it was not used by the deputy prosecutor as “as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” *Lewis*, 130 Wn.2d at 707. Therefore, such testimony was not an improper comment on the defendant’s silence, and the defendant has failed to show that the deputy prosecutor committed prosecutorial misconduct in this regard.

Finally, the defendant argues that the following remarks of the deputy prosecutor in rebuttal argument constitute prosecutorial misconduct:

[A]nd then he talks with her right when he arrests her. They bring her down to talk with the detectives; and when she’s done there talking with the detectives and with Deputy Heimann, at no point in time did she ever ask them, What are you doing? Why are you talking to me? What’s going on?

If you’re fuzzy, don’t you –I don’t understand. Why are you arresting me? What are you accusing me of? What do you think I’ve done? None of that, nothing to explain, look, I’m confused. I don’t know where I am. I don’t know how I got here. I don’t know who you are. None of that. When she gets down to the station, she says two things to Deputy Heimann. Would you have someone check on Michael? Deputy Heimann did not tell her – he told you he did not tell her about anything about Michael because he didn’t know Michael’s condition.

RP 1101. *See* Brief of Appellant, p. 17-18.

However, the deputy prosecutor here seems not to be commenting on the defendant's silence, but arguing that the credibility of the expert's opinion was diminished because it was based largely on narrative statements given by the defendant which did not support that opinion.

Indeed, shortly before the language complained of by the defendant, the deputy prosecutor argued, "[u]ltimately, [Dr. Gerlock's] opinion is: Only as good as the information on which it's based." RP 1098. The deputy prosecutor then went on to argue first that the medical record summaries drafted by the defense did not support Gerlock's opinion, RP 1098-99, and then, in the disputed portion of her argument, that the actions and statements of the defendant, as memorialized in the police reports upon which Gerlock also relied, did not support Gerlock's opinion. RP 1100-01. Given, that "the probative value of expert medical testimony may be lessened when it is based on subjective symptoms and narrative statements given by a defendant after he has been charged with a crime," *Lucas*, 271 P.3d 394 (2012), this was proper argument.

More important, because the deputy prosecutor was using this argument to undermine the credibility of Dr. Gerlock's opinion regarding diminished capacity rather than "as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt," *Lewis*, 130

Wn.2d at 707, this argument was not an improper comment on the defendant's post-arrest silence.

Moreover, because where "the State establishes that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver" of the rights to remain silent, *Thompkins*, 130 S. Ct. at 2254, the defendant here impliedly waived her rights to remain silent when she made statements to a law enforcement officer, specifically, Deputy Heimann. See RP 594, 601-02, 607. This fact alone distinguishes the present case from the cases of *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986) and *Matire v. Wainwright*, 811 F.2d 1430 (11th Cir. 1987), upon which the defendant relies. See Opening Brief of Appellant, p. 23-27. In neither of those cases, did the defendant make any statements to the law enforcement officers in question. *Greenfield*, 474 U.S. at 286; *Matire*, 811 F.2d at 1432. Here, there defendant did make statements to Deputy Heimann. Because "[w]hen a defendant does not remain silent and instead talks to police, the state may comment on what he [or she] does not say," *Clark*, 143 Wn.2d at 765, the deputy prosecutor's argument as to whether the defendant asked any questions of Deputy Heimann was proper. Therefore, the defendant has failed to show that the deputy prosecutor committed misconduct in this regard.

Thus, the defendant has failed to show the impropriety of any of the deputy prosecutor's questions or of her argument. The defendant has, therefore, likewise failed to show that the deputy prosecutor committed misconduct that was so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice. Because the defendant did not object to any of the questions or argument at issue here at the trial below, the defendant was required to make this showing. Given that she has not, she has failed to show prosecutorial misconduct and therefore, her convictions should be affirmed.

2. ASSUMING *ARGUENDO* THAT EITHER THE
DEPUTY PROSECUTOR'S QUESTIONS OR
HER ARGUMENT WERE IMPROPER, ANY
ERR WAS HARMLESS BECAUSE THERE WAS
OVERWHELMING UNTAINTED EVIDENCE
SUPPORTING THE DECISION OF THE JURY.

Even assuming that there was error, it was harmless within the context of this case.

"The usual test for harmless constitutional error is whether there is 'overwhelming untainted evidence' supporting the decision of the jury." *State v. Anderson*, 44 Wn. App. 644, 649, 723 P.2d 464 (1986) (quoting *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

In this case, there was such evidence. There was no dispute that the defendant hired a private investigator to reconnoiter Michael Witten's

present residence, RP 924-25, purchased a firearm and hollow-point bullets the week before the shooting, RP 490-93, rented a car, RP 511-22, drove that car to Witten's residence, approached the residence from the back with the loaded pistol in hand, and shot the defendant in the stomach. *See, e.g.*, RP 341-47, 435-37, 449. Although the defendant's hired expert, who was neither a physician nor psychologist, RP 857-58, opined that the defendant was not capable of forming intent to commit a crime at the time, RP 923-24, the defendant's actions outlined above, betray that opinion. Moreover, that opinion rendered as it was by a non-physician and non-psychologist and based as it was on absolutely no psychiatric or psychological testing, RP 871, 942, 962, 930-32, was simply not credible.

Given such evidence, "there is 'overwhelming untainted evidence' supporting the decision of the jury," and therefore, any err in admitting the disputed testimony or argument here at issue was harmless constitutional error. *See State v. Anderson*, 44 Wn. App. 644, 649, 723 P.2d 464 (1986) (*quoting State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

Therefore, the defendant's convictions should be affirmed.

D. CONCLUSION.

The defendant has failed to meet his burden of showing either prosecutorial misconduct or that the unchallenged argument at issue was flagrant and ill-intentioned because the deputy prosecutor's examination of witnesses and argument concerning the defendant's statements and


post-arrest silence were proper and consistent with constitutional guarantees.

Assuming *arguendo* that either such questions or such argument were improper, any err was harmless because there was overwhelming untainted evidence supporting the decision of the jury.

Therefore, the defendant's convictions should be affirmed.

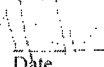
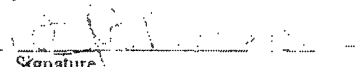
DATED: April 6, 2012

MARK LINDQUIST
Pierce County
Prosecuting Attorney


BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

 
Date Signature

PIERCE COUNTY PROSECUTOR

April 06, 2012 - 1:58 PM

Transmittal Letter

Document Uploaded: 420210-Respondent's Brief.pdf

Case Name: State v. Veronica Witten

Court of Appeals Case Number: 42021-0

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

☒ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): ____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: ____

Sender Name: Heather M Johnson - Email: **hjohns2@co.pierce.wa.us**

A copy of this document has been emailed to the following addresses:

KARSdroit@aol.com